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IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF DIEGO C. ASENCIO, A. PETER BURLEIGH, LINCOLN GORDON, ALLEN HOLMES, R. JWOZNIAK, ROBERT V. KEELEY, SAMUEL W. LEWIS, ROBERT A. MARTIN, ARTHUR MUDGE, DAVID NEWSOM, R. H. NOLTE, HERBERT S. OKUN, ANTHONY QUAINTON, WILLIAM D. ROGERS, MONTEAGLE STEARNS, VIRON P. VAKY, RICHARD N. VIETS, ALEXANDER F. WATSON, AND WILLIAM WATTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

WILLIAM M. HANNAY
Counsel of Record
KATHRYN D. ZALEWSKI
ARON L. BORNSTEIN
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500
Counsel for Amici Curiae

183408

COUNSEL PRESS
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INTEREST OF AMICI CURIAE

Each of the *amici curiae* has been in the diplomatic service of the United States government, for the most part as a presidential appointee.[1]

The names and diplomatic posts of the *amici curiae* are as follows:

Diego C. Asencio served as Ambassador to Colombia from 1977 to 1980, Assistant Secretary of State for Consular Affairs from 1980 to 1983, Ambassador to Brazil from 1983 to 1986, and Chairman of the Commission for the Study of International Migration and Cooperative Economic Development from 1987 to 1989.

A. Peter Burleigh served as Ambassador and Coordinator for Counter-Terrorism from 1991 to 1992, Ambassador and Deputy Permanent Representative to the United Nations from 1997 to 1999, and Ambassador to Sri Lanka and the Maldives from 1995 to 1997.

Lincoln Gordon served as Ambassador to Brazil from 1961 to 1966 and Assistant Secretary of State for Inter-American Affairs from 1966 to 1967.

Allen Holmes served as Ambassador to Portugal from 1982 to 1985, Assistant Secretary of State for Political-Military Affairs from 1985 to 1989, and Assistant Secretary of Defense for Special Operations and Low Intensity Conflict from 1993 to 1999.

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1. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae* and their counsel has made any monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

William Watts served as a Foreign Service Officer from 1956 to 1965 and Staff Secretary and Senior Staff Member of the National Security Council in the White House from 1969 to 1970.

Each is persuaded, as will appear below, that these cases present issues of profound importance to the future role and influence of the United States in the world. Accordingly, a*mici curiae* submit this brief in support of the petitioners, Shafiq Rasul, *et al.* and Fawzi Khalid Abdullah Fahad Al Odah, *et al.*

SUMMARY OF ARGUMENT

The courts below denied review of the executive branch's incarceration of the petitioners, effectively holding that when the executive acts against foreign citizens on foreign soil, it may do so with impunity, free of even minimal judicial review. These rulings undermine what has long been one of our proudest diplomatic advantages – this nation's constitutional guaranty, enforced by an independent judiciary, against arbitrary government power.

The rulings have not gone unnoticed abroad. Governments and international organizations have criticized them. Some have even interpreted the rulings as a license to incarcerate their own citizens and others without judicial review.

ARGUMENT

We, the *amici curiae* lending our names in support of this brief, have all been in the diplomatic service of the United States. Some have been ambassadors or foreign service officers, others have had appointments at senior levels in the Department of State or in the other agencies of the United States Government, dealing with "that vast external realm." All are retired from public service.

It is not our purpose to address the legal issues. They are for the parties. We hope rather to enlarge their presentation by setting before the Court our collective professional experience as to the significance for American diplomacy and international affairs of the holdings of the court below.

We understand that the D.C. Circuit Court held that the detention by the United States Government of twelve Kuwaiti nationals, two British nationals, and two Australian nationals in Guantanamo is beyond judicial review. These sixteen Guantanamo prisoners undeniably are incarcerated. They are kept in small cells. Their every activity is controlled by officers of the Executive Branch of the Government of the United States. They have had no hearing. They have no access to independent counsel. They may, for all that appears, be held in Guantanamo forever, yet no tribunal, military or civilian, has found that they committed a crime. Nor, for so long as the lower court's determination stands, can a court inquire into their custody. These sixteen have been deprived of their liberty without due process of law. But the issue is not whether the detentions will withstand constitutional inquiry. The issue before this Court is whether the detentions are subject to any judicial review whatsoever.

This is, from our foreign policy experience, a case of vast public import. Indeed, it has already become notorious abroad. The world has taken due note of the fact that the United States has incarcerated these foreign nationals in Guantanamo and that there has been no effort to charge, try or judge them under the law. This has produced wide protest. The Inter-American Commission on Human Rights has undertaken precautionary measures.[2] The UN High Commissioner for Human Rights has spoken out.[3] The International Committee of the Red Cross has gone on record.[4] The British Court of Appeal in the Abbasi case has

2. Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R. (March 12, 2002) *reprinted in* 41 I.L.M. 532 (2002) (requesting that prisoners be granted hearings on their status before a "competent tribunal").

3. Press Release, Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba, (Jan. 16, 2002), *available at* www.unhchr.ch under "news room, statements/messages" (last visited Sept. 30, 2003) (recalling that legal status of detainees, if disputed, must be determined by a "competent tribunal"); *see also* Press Release, US Court Decision on Guantanamo Detainees Has Serious Implications for Rule of Law, says UN Rights Expert, (March 12, 2003), *available at* www.unhchr.ch under "news room, press releases" (last visited Sept. 30, 2003) (ruling below "offends the first principle of the rule of law" and "can set a dangerous precedent").

4. Operational Update, *Guantanamo Bay: Overview of the ICRC's work for detainees*, Int'l Comm. of the Red Cross (Aug. 25, 2003), *available at* www.icrc.org (last visited Sept. 30, 2003) ("The ICRC's main concern today is that the US authorities have placed the internees in Guantanamo beyond the law. . . .").

expressed its concerns.[5] The Human Rights Chamber of Bosnia-Herzegovina, a court that the United States helped create, has issued its own protest.[6]

The world understands that there is debate in this country over the extent to which our criminal justice system must be amended to take account of the realities of terrorism. That is a domestic matter. The Guantanamo prisoners case has become a matter of unusual concern abroad because it presents the issue of how American power may be applied to people in other countries. Citizens of foreign countries cannot assume that what happened to the Guantanamo prisoners cannot happen to them. It will not be evident why, if the Executive Branch can detain prisoners in Guantanamo free of judicial inquiry, it cannot expand the practice to establish a global criminal justice system with a series of prison camps like Guantanamo which would be similarly subject to no legal oversight and in which any foreigner might be detained.

5. *Abbasi v. Secretary of State*, 2002 EWCA Civ 1598, 2002 All ER (D) (Nov) (U.K. Ct. App. 2002), par. 107 ("We have made clear our deep concern that, in apparent contravention of fundamental principles of law, Mr. Abbasi may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.").

6. *Boudellaa et al. v. Bosnia and Herzegovina et al*, Decision on Admissibility and Merits, Cases nos. CH/02/8679 *et seq.*, Human Rights Chamber for Bosnia and Herzegovina (Oct. 11, 2002), *available at* www. hrc.ba (visited Sept. 30, 2003), pars. 233 (hand-over of prisoners to U.S., before their transfer to Guantanamo, violated "obligations to protect the applicants against arbitrary detention by foreign forces") & 333 (Bosnia and Herzegovina must retain lawyers "to take all necessary action in order to protect the applicants' rights while in US custody. . . .").

The lower court's decision turned on the fact that the prisoners are in Guantanamo, Cuba. The use by the American military of its famous base in Cuba has a particular resonance abroad. As this Court well knows, Guantanamo is an artifact of America's imperial era in this Hemisphere. The nice distinction in the Court of Appeals' opinion – that the executive branch of the United States government can act as it will in Cuba, but the hand of the judiciary cannot reach that conduct – will be lost on others.

It has been the experience of each of us that our most important diplomatic asset has been this nation's values. Power counts. But this nation's respect for the rule of law – and in particular the nation's reverence for the fundamental Constitutional guarantee of individual freedom from arbitrary government authority – have gone far to earn us the respect and trust which lie at the heart of all cordial relations between nations. Thus the perception of this case abroad – that the power of the United States can be exercised outside the law and even, it is presumed, in conflict with the law – will diminish our stature and repute in the wider world.

We have come to believe, in our representation of this country to other nations, that those nations are more willing to accept American leadership and counsel to the extent that they see us as true to the principle of freedom under the law. Indeed, the matter has rarely been better put than President Bush put it in signing the Torture Victims Protection Act on March 12, 1992:

> In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen

> our commitment to ensuring that they are respected everywhere.[7]

The teaching of the courts below, however, is that those "democratic institutions and the rule of law" need not be respected in Guantanamo. This negative example puts United States citizens abroad – as well as those of other nations – at risk because it provides a justification for other countries' practices of arbitrary detention. When the second Gulf War began, many predicted that the United States' practices at Guantanamo Bay signaled a "double standard" that Iraq and others would use to justify mistreatment of American and coalition POWs.[8] Unfortunately, that message appears to have been received loud and clear by other foreign governments which have since sought to use the United States' example to justify abuses. For example, seeking to justify the detention

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7. Statement on Signing the Torture Victim Protection Act of 1991, 28 WEEKLY COMP. PRES. DOC. 465 (March 12, 1992).

8. *See, e.g.*, Jamie Fellner, *Prisoners of War in Iraq and at Guantanamo; Double Standards*, INT'L HERALD TRIB., March 31, 2003 ("At risk are not only the rights of the individuals who are detained today: by ignoring the clear mandates of international law, the United States invites every other country, including Iraq, to do the same."); Ivan Roman, *Critics: Guantanamo Example May Hurt POWs*, ORLANDO SENTINEL, March 30, 2003 ("Months before the first bomb was dropped on Baghdad on March 19, concerns arose about the Pentagon's position regarding the Guantanamo detainees and the implications it could have on its own troops heading to the Middle East."); Praful Bidwai, *Iraq: Doubts Grow on Quick Coalition Victory*, INT'L PRESS SERV., March 24, 2003 ("double standards" "starkly revealed" by detention of suspects in Guantanamo, "often in chains and inside cages. . . . Equally deplorable is the U.S. threat to treat Iraq's army officers as 'war criminals' merely because they are defending their country, while insisting that the U.S. prisoner-invaders be treated as POWs.").

of militants without trial, Malaysia's law minister said that its practice was "just like the process in Guantanamo Bay." He emphasized that he "put the equation with Guantanamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, *Malaysia slams criticism of security law allowing detention without trial*, Assoc. Press, Sept. 17, 2003.[9]

The present Administration summed up two centuries of foreign policy, embraced by Democratic and Republican administrations alike, in the National Security Strategy of the United States of America, issued in September 2002. That document said that the essence of American foreign policy was a "distinctly American internationalism that reflects the union of our values and our national interests." It added that "[i]n pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere." It promised: "We will speak out honestly about violations of the nonnegotiable demands of human dignity." And it defined these "nonnegotiable demands of human dignity" as including "the rule of law", "equal justice," and "limits on the absolute power of the state."[10]

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9. Egypt has also moved to detain human rights campaigners as threats to national security, as have Ivory Coast, Cameroon, and Burkina Faso. "The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, Cuba, instead of jails in the United States – and the White House's preference for military tribunals over regular courts – helps create a free license for tyranny in Africa." Shehu Sani, *U.S. actions send a bad signal to Africa: Inspiring intolerance*, INT'L HERALD TRIB., Sept. 15, 2003.

10. National Security Strategy of the United States of America (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.html.

In our professional experience we have found these principles to be the strongest assets of American diplomacy. The success of American diplomacy turns importantly on the extent to which this nation is perceived as abiding by these principles. The hint that America is not all that it claims, that it is prepared to negotiate or ignore a "nonnegotiable demand of human dignity", that it can accept that the executive branch may imprison whom it will and do so beyond the reach of due process of law demeans and weakens this nation's voice abroad.

We have taken it as our duty to so state to this court. Power counts, and there is no doubting America's power at this juncture. But values count too. And, for this nation, there is no benefit in the exercise of our undoubted power unless it is deployed in the service of fundamental values: democracy, the rule of law, human rights, and due process. To the extent that we are perceived as compromising those values, to that extent will our efforts to promote our interests in the wider world be prejudiced. Such at least is our collective experience.

CONCLUSION

For the reasons stated above, we request that this Court grant a writ of *certiorari* in each of the cases captioned above.

Respectfully submitted,

WILLIAM M. HANNAY
Counsel of Record
KATHRYN D. ZALEWSKI
ARON L. BORNSTEIN
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500

Counsel for Amici Curiae